Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

GEORGE T. KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002), the Court held that sections (8)(B) and (8)(D) of the 1996 Child Pornography Protection Act (18 U.S.C. § 2256) were overbroad and unconstitutional. The question presented in this petition is whether the 1996 Child Pornography Protection Act should be declared unconstitutional by virtue of it being overbroad and vague, thus violative of the First Amendment or the Court's Fifth Amendment-void-for-vagueness cases?

2. Whether petitioner's guilty plea should be vacated (via plain error) where count three of the information to which he pled guilty, post-*Ashcroft*, charged "child pornography" without differentiating between the potentially valid and invalid sections of 18 U.S.C, § 2256 declared unconstitutional pursuant to *Ashcroft*?

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PETITION FOR WRIT OF CERTIORARI

To: The Chief Justice and Associate Justices of the United States Supreme Court. May it please the court:

George T. Kelly (hereafter petitioner), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The published opinion and judgment of the court of appeals was filed on January 3, 2003, and is reported at 314 F.3d 908. Pet. App., *infra*, 1a-10a. The petitioner did not seek rehearing.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."

The Fifth Amendment to the United States Constitution provides [that] "No person shall . . . be deprived of life, liberty, or property, without due process of the law."

18 U.S.C. § 2252A(a)(5)(B) states [that]: Any person who—either—knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in inter-

state or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b) (18 U.S.C. § 2252A is reproduced in its entirety at App. 11a-14a).

STATEMENT

1. Prior to January 2002 petitioner, age 63, had retired after approximately thirty years of service as a supervising engineer with the Metropolitan Water Reclamation District of Greater Chicago. He also held Illinois architect and landscape architect licenses. At all times herein pertinent, petitioner lived with his spouse and family in a western suburb of Chicago.

2. On January 28, 2002, via information 02 CR 118, petitioner was charged in the United States District Court in Chicago with offenses relating to the Child Prevention Pornography Act, 18 U.S.C. § 2252A (CPPA). As relevant to this petition, count three charged petitioner with violating 18 U.S.C. § 2252(a)(5)(B). Reproduced at App. 15a.

On February 14, 2002, petitioner, with counsel, appeared before the district court, waived indictment and entered a plea of guilty to counts three and twelve of information 02 CR 118 (R. 6-7). The statutory underpinning for count three was 18 U.S.C. §§ 2252A(a)(5)(B) (relevant segments of §§ 2252A reproduced at App. 11a-13a).

3. On April 16, 2002, the Court decided *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389. When petitioner appeared for sentencing on April 19, 2002, pursuant to *Ashcroft*, the government was granted leave to dismiss count twelve (R. 10). Petitioner's counsel ad-

vanced arguments supporting the proposition that *Ashcroft* mandated the dismissal of count three. In pertinent part, counsel argued:

> Our objection is, the Supreme Court has said that what he sent to the other gentleman is lawful and constitutional and cannot be prescribed by Congress in the opinion that was written by the Supreme Court. You can't punish him for lawful conduct.

Id. at Tr. 9. After further colloquy with the district court, petitioner's counsel continued to maintain that *Ashcroft* impacted on count three as follows:

> MR. KOMIE [defense counsel]: Judge, the other problem we have here is that everything that was done here, including the guidelines, was done on the assumption that the law was valid when the Sentencing Commission formulated them in 1996. The statute that he has plead guilty to was a 1996 enactment that the Supreme court has said is unconstitutional. There is no language in the Supreme Court opinion saving any other part of that enactment at this point. In other words, the Supreme Court points to other sections of the code that it says are valid.
>
> THE COURT: Well, your reading of the Supreme Court opinion is much different than mine. I thought the Supreme Court restricted its holding to the subject of virtual pornography as opposed to the use of live children to create pornography.
>
> MR. KOMIE: That may have been the portion they were talking about in terms of finding it unconstitutional, but they went on to say which were the valid laws in that same sections of the code, and it says on page seven of the opinion,

> "... Congress may pass valid enactments to protect children from abuse, and it has ..."
>
> and then it goes on to point out 18 USC 2241 and 2251, but there's nothing in this opinion that saves the statute.
>
> THE COURT: I beg to differ with you on that.

Id. at Tr. 11-12.

After the district court rejected petitioner's *Ashcroft* importunings (for count three dismissal) and following Federal Sentencing Guideline departure-related arguments (not at issue here), petitioner was sentenced to 33-months in federal custody (R. 12, 19). Petitioner self-surrendered to commence service of his sentence and prosecuted a direct appeal.

4. Petitioner advanced similar *Ashcroft*-related arguments on direct appeal and on January 3, 2003, the court of appeals held that 18 U.S.C. § 2252A(a)(5)(B) was not impacted by *Ashcroft* and affirmed petitioner's conviction (Pet. App., *infra*, 2a-8a).

Because the circuits are divided regarding *Ashcroft's* impact, *viz.*, the CPPA, petitioner seeks review and reversal.

REASONS FOR GRANTING THE PETITION

1. Background. The CPPA of 1996 represents a content-specific enactment which attempts to regulate speech based on the thoughts or ideas [it] conveys to the viewer. Hence it must be subjected to exacting constitutional scrutiny and such content-based regulations are presumptively invalid, *R.A.V. v. City of St. Paul, MN.*, 505 U.S. 377, 382, 112 S.Ct. 2538 (1992) (Content-based regulations are presumptively invalid) (parallel citations

omitted). While the First Amendment fails to include a freedom to disregard traditional limitations, obscenity falls within protected speech. *Id.* at 383-84 (citing *Sunstein, Pornography and the First Amendment,* 1986 Duke L.J. 589, 615, n. 146). In *R.A.V.*, Justice Scalia took issue with a segment of Justice White's concurring opinion, explaining:

> Although Justice WHITE asserts that our analysis disregards "established principles of First Amendment law," *post*, at 2560, he cites not a single case (and we are aware of none) that even involved, much less considered and resolved, the issue of content discrimination through regulation of "unprotected" speech—though we plainly *recognized* that as an issue in *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

505 U.S. at 386, n. 5.

The CPPA significantly expanded that which has been considered "child pornography" by including within that definition sexually explicit depictions of nonchildren, including youthful-looking adults as well as non-existent characters or actors. Under the CPPA child pornography is defined as any sexually explicit material that: (1) depicts actual minors; (2) depicts persons who appear to be minors; (3) modifies or alters the image of an identifiable minor so that the minor appears to be engaging in sexually explicit conduct; or (4) is advertised or described so as to convey the impression that it depicts a minor. See 18 U.S.C. § 2256(8).[1] *United States Senate Report* No. 358

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[1] The CPPA expanded the definition of "child pornography" by including definitions by including sexually explicit depictions of nonchildren, youthful-looking adults and fictional characters. In addition, the 1996 Act amended §§ 2251, 2252, 2256 and added

(continued...)

incorporated repeated warnings from constitutional scholars that the CPPA would not pass constitutional muster (S.Rep. No. 358 at 29). For example, Professor Frederick Schauer, who had been appointed Commissioner of the Attorney General's Commission on Pornography, advised Congress that the CPPA would be unconstitutional. *Ibid.* Members of Congress also warned that the extreme expansion of child pornography legislation embraced by the CPPA would likewise fail under Supreme Court precedent. *Id.* at 37-38. Based on the concerns of constitutional scholars and members of Congress, the Senate added § 2256(8)(c) which arguably addressed concerns surrounding the definition of child pornography, S.Rep. 358 at 11, 31.

2. The antecedent CPPA challenge. In *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), a divided court held that segments of 18 U.S.C. § 2256A were vague and overbroad and did not meet the requirements of the First Amendment, 198 F.3d at 1086, 1094. In part, the majority explained:

> By criminalizing all visual depictions that "appear to be" or "convey the impression" of child pornography, even where no child is ever used or harmed in its production, Congress has outlawed the type of depictions explicitly protected by the Supreme Court's interpretation of the First Amendment. Because the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in il-

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[1] (...continued)
§ 2252A labeled "certain activities relating to material constituting or containing child pornography," [which] prohibits persons from mailing, transporting, receiving, distributing, reproducing, selling or possession child pornography (as redefined by the Act) within interstate or foreign commerce.

> licit creative acts, we determine that censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment.

198 F.3d at 1094. In addition, the *Free Speech* majority held that the CPPA was constitutionally infirm under the First Amendment because it was overbroad:

> The CPPA's inclusion of constitutionally protected activity as well as legitimately prohibited activity makes it overbroad (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 98 S.Ct. 2908 (1973)).

Id. at 1096. Further, the *Free Speech* majority held that the Acts criminalizing material that "appears to be a minor" and "convey[s] the impression" that a minor [is] engaged in explicit sexual activity is void-for-vagueness. *Id.* at 1095.

In *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002), the Court affirmed the Ninth Circuit majority, explaining, in part:

> The court [USCA 9] held the CPPA to be substantially overbroad because it bans materials that are neither obscene nor produced by the exploitation of real children as in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). * * * The Court of Appeals voted to deny the petition for rehearing en banc, over the dissent of three judges. See 220 F.3d 1113 (2000). *While the Ninth Circuit found the CPPA invalid on its face*, four other Courts of Appeals have sustained it. * * *

122 S.Ct. at 1398 (ital. emph. added).

Thereafter, the Court reviewed the constitutionality of the CPPA in its entirety because the Act was a major departure from the established balance between the First

Amendment's free speech protections and the Government's interest in protecting children from the trauma of child pornography. In pertinent segments of its opinion, the Court refers to the Act in its entirety and defines the pivotal issue as follows:

> "We consider in this case whether the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2251 *et seq.*, abridges the freedom of speech."

122 S.Ct. at 1396. The Court later explained, "The CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber*," 122 S.Ct. at 1402.[2]

Similarly, when discussing how the Act suppresses protected speech, the Court again refers to the entire Act when discussing the fundamental problems with its construction:

> The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. § 2252A(b)(a). A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison. *Ibid.* While even minor punishments can chill protected speech [citations

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[2] *Ferber* = *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348 (1982) and *Miller* [*v. California*], 413 U.S. 15, 93 S.Ct. 2607 (1973). Regarding *Ferber*, the Court explained that "*Ferber's* judgment about child pornography was based upon how it was made, not what it communicated and it reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protections of the First Amendment," 122 S.Ct. at 1402. In connection with *Miller*, the Court summarized the holding, explaining [that] "the Government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lack serious literary, artistic, political, or scientific value." *Id.* at 1399.

> omitted], this case provides a textbook example of why we permit facial challenges to statutes that burden expression.

122 S.Ct. at 1398.

The *Ashcroft* decision sustained First Amendment challenges to 18 U.S.C. §§ 2256(8)(b) and 2256(8)(d). *Id.* at 1405-06. Justice Thomas cautiously concurred suggesting that based on "technical advances" the government may have a compelling interest in barring or regulating "narrow" categories of "lawful speech" to effectively enforce pornography laws. *Id.* at 1406-07. Justice O'Connor's concurring/dissenting opinion, joined in part, by the Chief Justice and Justice Scalia, noted that CPPA's ban on "youthful-adult" pornography *appeared* to violate the First Amendment [but] the ban on virtual-child pornography does not. *Id.* at 1410 (discussing § 2256(8)(b)). The Chief Justice and Justice Scalia dissented urging that the Act be construed in a manner consistent with the First Amendment and therefore the statute should be sustained in its entirety. *Id.* at 1413-14.

Recall that the Court of Appeals' majority in *Free Speech* held that the Act was both overbroad and was unconstitutionally vague—explaining that:

> A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement.

198 F.3d at 1095 (quotation marks and supporting citation omitted). Thus this Court's affirmation of the Ninth Circuit *Free Speech* majority necessarily connotes that the CPPA is both overbroad and suffers the vice of "void for vagueness." That said, the opinion of the Court of Appeals for the Seventh Circuit in the case below conflicts

with this Court's opinion in *Ashcroft* and the Ninth Circuit's majority opinion in *Free Speech*.

3. Circuit Conflict. The lack of circuit harmony becomes more pronounced when considering decisions such as *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001) and *United States v. Snow*, No. 01-20129 (5th Cir. 2001) (unpublished). In both *Fox* and *Snow*, the defendants (as the petitioner here), were charged with offenses under 18 U.S.C. § 2252A(a)(5)(B). Post-*Ashcroft*, the Court granted cert., vacated and remanded (*Fox*, 122 S.Ct. 1602; *Snow*, 122 S.Ct. 1603). On remand, the Fifth Circuit returned *Fox* and *Snow* to the district court for further review, *Fox*, 293 F.3d 237 (5th Cir. 2002); *Snow*, unpublished Fifth Circuit order dated October 4, 2002 under No. 01-20129 remanded to district court. To be sure, the GVR orders do not amount to a final determination on the merits, but may indicate "a reasonable possibility that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S.Ct. 604 (1996).[3]

In the ensemble, petitioner maintains that given the affirmation of the Ninth Circuit's *Free Speech* majority in *Ashcroft*, blended with the Fifth Circuit's GVR holdings in *Fox* and *Snow* (returning both cases to the district court), there is a clear conflict between those decisions and the holding below in petitioner's case.[4]

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[3] Justice Scalia (joined by Justice Thomas) filed a dissenting opinion, *sub nom.*, *Stutson v. United States*, 516 U.S. at 178, 116 S.Ct. 612 (1996), explaining the shortcomings in the Court's GVR practice. Petitioner pretermits any observations regarding the Court's GVR custom.

[4] Supreme Court Rule 10(a) provides that review by this Court may be granted where a "United States court of appeals has

(continued...)

In all events, it is pristine that the Court held that segments of § 2256A were constitutionally overbroad and violative of the First Amendment, 122 S.Ct. at 1405-06.[5]

4. CPPA-Facially Unconstitutional. Petitioner maintains that the CPPA is facially unconstitutional in that it prohibits a substantial amount of protected expression. For example, the Act includes the word "image" but fails to define "image." According to Funk & Wagnalls 1977 edition of the *Comprehensive International Dictionary of English Language*, pg. 630, image is defined as a noun—(1) a visible representation of something; a statue, picture, idol, etc., (2) *Optics* The picture or counterpart of an object produced by reflection or refraction, or the passage of rays through a small aperture. If such an image can be actually thrown on a surface as in a camera, it is a **real image**; but if it is visible only as in a mirror, it is a **virtual image**; * * *.

The importance of "image" cannot be overlooked. Petitioner was charged with knowingly possessed a computer hard-drive containing an "image" of child pornography. Pet. App. 15a, *infra*. Can it be gainsaid that the First Amendment prohibits "images" where there is no rational basis for determining that which constitutes an "image?" Recall that segments of Senate Report No. 358 included

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[4] (...continued)
entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

[5] The Court specifically held that § 2256(8)(b) which includes any "visual depiction [that] . . . appears to be of a minor engaging in sexually explicit conduct," and § 2256(8)(d) which includes any "visual depiction [that] is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."

observations by constitutional scholars advising Congress that the CPPA will be held unconstitutional and thus rendered useless in battling child pornography. *Id.* at 29. The CPPA is realistically a criminal enactment intended to control evil speech and ideas which fails to satisfy First Amendment requirements. Clearly it is a content-specific enactment on speech because it regulates expression predicated on the ideas conveyed to viewers and is presumed unconstitutional, *R.A.V.*, *supra*, 505 U.S. at 382. Further it must be subjected to the most exacting constitutional scrutiny, *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157 (1988).

In connection with strict scrutiny-First Amendment, the Court's current docket includes *United States v. American Library Association, Inc.*, cert. granted, 123 S.Ct. 551 (2002). In *American Library,* the government is challenging a three-judge district court decision which held the Childrens Internet Protection Act, Pub.L. No. 106-554, facially invalid under the First Amendment, case below, 201 F.Supp.2d 401 (E.D. Pa. 2002).

The district court decision in *American Library* cited to *Ashcroft v. Free Speech Coalition*, explaining, *inter alia,* [that] "[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct," 201 F.Supp. at 473-74. The Court continued citing *Free Speech* noting that "The argument . . . that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down. The government may not suppress lawful speech as the means to suppress unlawful speech," 201 F.Supp. at 477.[6]

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[6] The *American Library* district court decision continued citing *Free Speech, vis-a-vis,* First Amendment rights to possess obscene materials. *Id.* at 478.

Because the Court's decision in *American Library* may impact on this petition, it is respectfully suggested, that disposition of this petition be held in abeyance pending the decision in *American Library*.

5. Guilty Plea Vacation-Plain Error. As earlier explained, petitioner was charged in count three of information 02-118 with knowingly possessed [on or about February 12, 2001] a computer hard drive containing an "image of child pornography" . . . in violation of 18 U.S.C. § 2252A(a)(5)(B).[7] The relevant definitional section sets out four different ways that "visual depictions" may qualify as "child pornography," (18 U.S.C. § 2256(8)(A)-(D)). But in *Free Speech Coalition* this Court specifically held that the segments of the definition of "child pornography" found in 18 U.S.C. § 2256A(8)(b) and (8)(d) were unconstitutionally overbroad and violative of the First Amendment, 122 S.Ct. at 1405-06.

The difficulty in petitioner's case is that count three of the information failed to specify which of the four definitions may have been involved in an undifferentiated reference to "child pornography." Pet. App. at 15a. Thus it is impossible to know whether count three was predicated on segments of "child pornography" specifically declared unconstitutional in *Free Speech Coalition*. Under such cir-

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[7] In accordance with Rule 7(b), Fed.R.Crim.Proc., petitioner waived indictment. However the term "indictment" includes an indictment or information in any court under which a crime is punishable by imprisonment for a term exceeding one year . . ., *United States v. Fillman*, 162 F.3d 1055, 1057 (10th Cir. 1998) (Fillman challenged his conviction pursuant to 18 U.S.C. § 842(i) based on the proposition that an antecedent criminal charge was by "information" not "indictment." The court rejected his statutory challenge finding there was no difference between [an] indictment or information for purposes of § 842(i)); Accord *United States v. Gevedon*, 214 F.3d 807, 813 (7th Cir. 2000) (same-collecting parallel circuit decisions).

cumstances petitioner did not receive clear notice of the charges and therefore a finding of plain error may ensue, see *Menna v. New York*, 423 U.S. 61, 62-63, n. 2, 96 S.Ct. 241 (1975) ("[A] plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute."); *United States v. Knowles*, 29 F.3d 947, 951 (5th Cir. 1995) (reversing, on plain error review, conviction obtained on guilty plea where statute of conviction had been declared unconstitutional during timeframe between sentencing and appeal).[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] Petitioner failed to challenge his guilty plea below based on a *Menna/Knowles* analysis and therefore [guilty plea vacation] relief can be granted only by way of plain error, cf., *United States v. Vonn*, 535 U.S. 55, 122 S.Ct. 1043 (2002). Petitioner concedes that in light of *United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781 (2002), any [lack of district court] jurisdiction[al] argument falls by the wayside. However, unlike Cotton, petitioner asserts that plain error is evident because there is neither compelling nor overwhelming "child pornography" proof (and unlike *Cotton*, petitioner does not incorporate any purported *Apprendi v. New Jersey* (530 U.S. 466 (2000) issue as part of this petition). In all events, the Court may exercise its Rule 10(a) supervisory power by entering an order vacating petitioner's count three-guilty plea conviction and directing further lower court review.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-2064

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE KELLY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 02 CR 118—**Suzanne B. Conlon**, *Judge.*

ARGUED NOVEMBER 14, 2002—DECIDED JANUARY 3, 2003

Before RIPPLE, ROVNER and DIANE P. WOOD, *Circuit Judges.*

RIPPLE, *Circuit Judge.* In April 2002, George Kelly was convicted of one count of possession of child pornography, 18 U.S.C. § 2252A(a)(5)(B). On appeal, he contends that the district court lacked subject matter jurisdiction to convict him because the child pornography statute was declared unconstitutional in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002). We disagree. *Free Speech Coalition* strikes down only the statute's expanded definition of child pornography to encompass virtual material. The Supreme Court of the United States did not disturb long-standing precedent sanctioning Congress' ban on traditional child pornography. Mr. Kelly was convicted of possessing traditional child pornography; accordingly, we affirm the judgment of the district court.

I

BACKGROUND

In January 2002, Mr. Kelly was charged by information with eleven counts of possessing child pornography, 18 U.S.C. § 2252A(a)(5)(B), and one count of shipping child pornography, 18 U.S.C. § 2252A(a)(1). The district court rejected Mr. Kelly's offer to plead nolo contendre to Count 3, one of the possession charges, and Count 12, the shipping charge, but accepted his guilty pleas to both. Mr. Kelly was part of a group characterized by the Government as "involved in the fetishistic abuse of children." The group's members lived in the United States and Canada and exchanged child pornography. Mr. Kelly sent "virtual" child pornography to other members of the group in exchange for "real" child pornography. Real or traditional child pornography contains images of real children; virtual child pornography contains images "that appear to depict minors but were produced without using any real children." *Free Speech Coalition*, 122 S. Ct. at 1396. Virtual images may be created by "using adults who look like minors or by using computer imaging." *Id.* When he was caught, Mr. Kelly's computer hard drive contained 29 images of child pornography. In addition, the Government had proof that he had shipped 40 images contained on computer disks to an associate in Georgia.

Following Mr. Kelly's guilty pleas but before sentencing, the Supreme Court decided *Free Speech Coalition*, which struck down portions of the Child Pornography Prevention Act of 1996 ("CPPA") as unconstitutional. *See id.* at 1405-06. In light of *Free Speech Coalition*, the Government moved to dismiss Count 12 because the charge had been based on Mr. Kelly's distribution of virtual child pornography. The district court granted the Government's motion and proceeded to sentence Mr. Kelly on Count 3 for his possession of traditional child

pornography in violation of § 2252A(a)(5)(B). At sentencing, Mr. Kelly argued that the decision in *Free Speech Coalition* also required dismissal of the charge for possession of traditional child pornography, but the district court disagreed and sentenced him to 33 months' incarceration, 3 years' supervised release, a $10,000 fine and a $100 special assessment. The single issue on appeal is whether *Free Speech Coalition* invalidated the portion of the CPPA under which Mr. Kelly was convicted. *See* 18 U.S.C. § 2252A(a)(5)(B).

II

ANALYSIS

The constitutional viability of § 2252A(a)(5)(B) in light of *Free Speech Coalition* has not been addressed by this circuit. In 1996, Congress enacted the CPPA as one in a long series of amendments to the original Protection of Children Against Sexual Exploitation Act of 1977. *See generally Free Speech Coalition v. Reno*, 198 F.3d 1083, 1087-89 (9th Cir. 1999) (recounting history of the original act). The CPPA added computer disks that contain three or more images of child pornography to the existing list of prohibited media. *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Title I § 121(3)(a), 110 Stat. 3009-29 (1996) (codified as amended at 18 U.S.C. § 2252A(a)(5)(B)). In 1998, this section was amended to encompass disks that contain a single image. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, Title II § 203(b), 112 Stat. 2978 (1998). Together these amendments make up the current statute under which Mr. Kelly was convicted. 18 U.S.C. § 2252A(a)(5)(B).

In addition to criminalizing possession of computer disks, the CPPA's more high-profile amendment was its expan-

sion of the definition of child pornography to include "virtual" material. 18 U.S.C. § 2256(8)(B), (D). The older definition of child pornography had included only images of real children, but the expanded definition includes any image that "appears to be" of a minor or "conveys the impression that the material is or contains a visual depiction of a minor." *Compare* 18 U.S.C. § 2256(8)(A) *with* 18 U.S.C. § 2256(B), (D). In *Free Speech Coalition*, the Supreme Court struck down, as violative of the First Amendment, the provisions of the CPPA that expanded the definition of child pornography to include virtual images. *Free Speech Coalition*, 122 S. Ct. at 1405-06.

Mr. Kelly argues that his conviction should be overturned because, in his view, *Free Speech Coalition* rendered the *entire* CPPA unconstitutional and thus deprived the district court of jurisdiction to convict him under § 2252A(a)(5)(B), a section of the code added by the CPPA. We cannot accept this contention. Mr. Kelly's view conflicts with the opinion's language that specifically limits the ruling to the two provisions that expand the definition of child pornography to include virtual material. Further, the Court's First Amendment analysis logically applies only to virtual child pornography. Finally, other circuits have interpreted the *Free Speech Coalition* opinion as limited to virtual child pornography. In *Free Speech Coalition*, the Supreme Court considered whether the CPPA's regulation of virtual child pornography could survive a First Amendment challenge. In previous decisions, the Court had created standards for the regulation of adult pornography as well as traditional child pornography. For regulations of adult pornography to square with the First Amendment, the regulated material must be obscene under *Miller v. California*, 413 U.S. 15, 24 (1973). *See Free Speech Coalition*, 122 S. Ct. at 1399-1401. Later, *New York v. Ferber*, 458 U.S. 747 (1982), held that child pornography, even if not obscene under *Miller*, could

still be prohibited in accordance with the First Amendment because states have compelling reasons to regulate pornography that results from sexual exploitation of children. *Id.* at 761; *see Free Speech Coalition*, 122 S. Ct. at 1401-02. *Free Speech Coalition* reviewed the CPPA's attempt to regulate virtual child pornography, material that the Court determined was not necessarily obscene under the *Miller* test and was not the product of child sexual abuse because no minors were actually used to create it. *See id.* at 1396, 1405. The Court ultimately held the CPPA's attempt to regulate virtual child pornography unconstitutional under the First Amendment.

Throughout its opinion in *Free Speech Coalition*, the Supreme Court expressly limited the holding of the case to the expanded definition of child pornography. The Court noted that, prior to 1996, Congress had focused on images created using real children. The 1996 act "retains that prohibition . . . and adds three other prohibited categories of speech, of which the first, § 2256(8)(B), and the third, § 2256(8)(D), are at issue in this case." *Free Speech Coalition*, 122 S. Ct. at 1397. There are similarly explicit statements throughout the opinion. *See, e.g., id.* at 1406 ("For the reasons we have set forth, the prohibitions of §§ 2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional.").

Further, the Court's reason for declaring a portion of the act unconstitutional logically applies only to the virtual child pornography definitions. The Court held the act unconstitutional to the extent that it regulated images that are neither obscene under *Miller* nor child pornography under *Ferber*. *See Free Speech Coalition*, 122 S. Ct. at 1396, 1405. The decision was clearly directed at the expanded definition of child pornography and determined that virtual child pornography was different from real child pornography under First Amendment analysis.

Regulation of traditional child pornography remains constitutional under the *Ferber* decision.

In addition to the language and reasoning of *Free Speech Coalition* suggesting a limited holding, the Eleventh Circuit has interpreted the *Free Speech Coalition* opinion as reaching only virtual child pornography. *See United States v. Richardson*, 304 F.3d 1061, 1063-64 (11th Cir. 2002) (jury instruction that defined child pornography to include both real and virtual images was not plain error because defendant possessed real images); *United States v. Hersh*, 297 F.3d 1233, 1254 n.31 (11th Cir. 2002) (noting that *Free Speech Coalition* applies only to virtual child pornography); *United States v. Bender*, 290 F.3d 1279, 1281-82 n.2 (11th Cir. 2002) (noting that *Free Speech Coalition* does not apply because defendant possessed actual child pornography).[1]

Counsel for Mr. Kelly invites our attention to two cases that the Supreme Court vacated and remanded for further consideration in light of *Free Speech Coalition*. *See United States v. Mento*, 122 S. Ct. 1602 (2002); *United States v. Fox*, 122 S. Ct. 1602 (2002), on remand, 293 F.3d 237 (5th Cir. 2002). Counsel submits that those cases involved actual child pornography, and the remand therefore suggests that the Supreme Court interprets its own

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[1] We also note that the Third and Fourth Circuits have released unpublished orders interpreting *Free Speech Coalition* as applying only to virtual child pornography. *See United States v. Davis*, No. 00-3536, 2002 WL 1754429 (3d Cir. July 26, 2002) (Unpublished Order); *United States v. Maxwell*, No. 02-4353, 2002 WL 31324063 (4th Cir. Oct. 18, 2002) (Unpublished Order). Finally, in a statement not essential to its holding, the Fifth Circuit interpreted *Free Speech Coalition* as leaving intact the definition of actual child pornography contained in § 2256(8)(A). *See United States v. Reedy*, 304 F.3d 358, 365 n.3 (5th Cir. 2002).

Free Speech Coalition decision to affect convictions for possession of actual child pornography. Mr. Kelly reads far too much into the Supreme Court's very brief remand orders. The Court, as is its practice, simply directed the lower court to review its earlier decision in light of *Free Speech Coalition*.[2]

Because the language and reasoning of the *Free Speech Coalition* opinion relate only to the expanded definition of child pornography that brings virtual material within the scope of the act, the other sections of the CPPA can be severed and left intact unless it appears that Congress would not have enacted the constitutional portions of the statute alone. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). The CPPA has a savings clause evidencing Congress' intent to make the statute severable. Pub. L. No. 104-208, Title I § 121(8), 110 Stat. 3009-31 (1996) ("If any provision of this Act, including any provision or section of the definition of the term child pornography, . . . is held to be unconstitutional, the remainder of this Act, including any other provision or section of the definition of the term child pornography, . . . shall not be affected thereby."). The portion of the act under which Mr. Kelly was convicted regulates the possession of traditional child pornography and relies on the definitional section to define child pornography. *Free Speech Coalition* invalidated the two definitions that encompassed virtual child pornography, but the act still con-

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[2] *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, Kenneth Geller, *Supreme Court Practice* § 5.12 at 319 (8th ed. 2002) ("It seems fairly clear that the Court does not treat the summary reconsideration order as the functional equivalent of the summary reversal order and that the lower court is being told simply to reconsider the entire case in light of the intervening precedent—which may or may not compel a different result.") (footnote omitted).

tains a valid definition of traditional child pornography at 18 U.S.C. § 2256(8)(A). Because regulation of real child pornography remains constitutional under *Ferber*, and Mr. Kelly possessed real child pornography, we affirm the judgment of the district court.

Finally, we note that, Mr. Kelly filed a motion to strike the statement of facts in the Government's brief because the Government included facts from and cited the confidential pre-sentence investigation report ("PSR"). We previously have permitted parties to cite the PSR in briefs in order to challenge sentencing decisions when the district court adopted the PSR as findings of fact for sentencing purposes. In *United States v. Strache*, 202 F.3d 980, 987 (7th Cir. 2000), we specifically noted that widespread use of the PSR for other purposes was improper; *see also United States v. Menting*, 166 F.3d 923, 928 (improper to use PSR to show jury had sufficient evidence to support its guilty verdict). Here, the Government included information from the PSR even though Mr. Kelly presents no issue about his sentencing. We thus remind all counsel that indiscriminate use of the content of the PSR is inappropriate. We further remind counsel that, when it is necessary to discuss sensitive sentencing information derived from the PSR, it may be appropriate to proceed under seal. *See generally In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) (briefs should be public, but confidential information may be included in a sealed supplement). However, in this particular case, the facts disclosed by the Government are tangential, and we conclude that striking the entire statement of facts would not be warranted.

Conclusion

Accordingly, the judgment of the district court is affirmed. The motion to strike is denied.

AFFIRMED
Motion to Strike DENIED

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 3, 2003

BEFORE:

Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge
Honorable DIANE P. WOOD, Circuit Judge

No. 02-2064

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE KELLY,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 02 CR 118, Suzanne B. Conlon, Judge

The judgment of the District Court is AFFIRMED. The motion to strike is DENIED. The above is in accordance with the decision of this court entered on this date.

(1061-110393)

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I—CRIMES

CHAPTER 110—SEXUAL EXPLOITATION
AND OTHER ABUSE OF CHILDREN

§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or

shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter, chapter 109A, chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3), or (4) of subsection (a) that—

(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

(2) each such person was an adult at the time the material was produced; and

(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

(d) Affirmative Defense.—It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(Added Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121, subsection 3(a)], Sept. 30, 1996, 110 Stat. 3009-28, and amended Pub.L. 105-314, Title II, § § 202(b), 203(b), Oct. 30, 1998, 112 Stat. 2978.)

COUNT THREE

The UNITED STATES ATTORNEY further charges:

On or about February 12, 2001, at Lombard, in the Northern District of Illinois, Eastern Division,

GEORGE KELLY,

defendant herein, knowingly possessed a computer hard-drive containing an image of child pornography, namely D:\ERASED\REM00003.X32\XDF01402.X32, that was produced using materials that had been mailed, shipped, and transported in interstate and foreign commerce by any means;

In violation of Title 18, United States Code, Section 2252A(a)(5)(B).